A **BORNEO WEALTH SDN BHD v. RATNA SERI ARIF & ORS**

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ISMAIL BRAHIM JC
[SUIT NO: BKI-22NCVC-3-1-2015]
28 AUGUST 2017

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CIVIL PROCEDURE: *Locus standi – Claim for loss and damage – Land dispute – Dispute concerning open space separating lands belonging to parties – Open space meant for benefit, use and enjoyment of all adjoining land owners and inhabitants of area – Allegations that other land owners disturbed and interfered with claimant's rights to use and enjoy open space by erecting permanent structure – Whether claimant was natural person – Whether able to use and enjoy open area – Whether claimant had locus standi to sue for loss and damage – Local Government Ordinance 1961, s. 38(1)*

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D ***CIVIL PROCEDURE:*** *Action – Preliminary issues – Issues to be determined/tried – Land dispute – Dispute concerning designated open space separating lands belonging to parties – Open space meant for benefit, use and enjoyment of all adjoining land owners and inhabitants of area – Allegations that other landowners disturbed and interfered with claimant's rights to use and enjoy open space by erecting permanent structure – Whether claimant, as company and not natural person, able to use and enjoy open area – Whether claimant able to or had locus standi to sue for loss and damage – Rules of Court 2012, O. 33 r. 2*

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The plaintiff was the registered owner of a piece of land adjacent to the defendants' land. The plaintiff's land and the defendants' properties were separated by an open space. According to the plaintiff, the open space, which was endorsed on all document titles of the parties, was meant for the benefit, use and enjoyment of all the adjoining land owners and inhabitants of the area. However, the defendants have disturbed and interfered with the plaintiff's rights to use and enjoy the open space by erecting permanent structures. The plaintiff commenced an action against the defendants, seeking an order (i) that the defendants remove and demolish the encroachments and obstructions on the open space; and (ii) for damages. In defence, the defendants argued that (i) the open space was not necessarily for the benefit and enjoyment of the registered landowner; (ii) some of the structures complained of by the plaintiff were erected more than 30 years ago and there were no complaints by the inhabitants of the area, including the plaintiff, all these while; and (iii) the plaintiff's claim was barred by acquiescence, laches and delay. The defendants filed the present application for the following issues to be determined/tried as preliminary issues under O. 33 r. 2 of the Rules of Court 2012, namely, (i) whether the plaintiff, as a company and not a natural person, was able to use and enjoy open public places; and

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(ii) whether the plaintiff was able to or had *locus standi* to sue for loss and damage for allegedly being deprived of the use and enjoyment of open public places. The defendants' application was premised on the grounds that the determination of the two issues in favour of the defendants would conclude the plaintiff's action and there would be no necessity to try the other issues.

Held (dismissing application):

(1) The issue that was central and ought to be considered first was the issue of whether the plaintiff had the *locus standi* to sue the defendants. Section 38(1) of the Local Government Ordinance 1961 ('the Ordinance') does not preclude the inhabitants to take legal action in their own right, or in this case the plaintiff, as it had common rights over the open space as endorsed in its land title. The issue whether it had a case that was founded on the tort of public/private nuisance or trespass would be a matter to be decided in a trial and determined based on extrinsic evidence. (paras 31 & 33)

(2) The open space endorsed on a land title might be used as a green lung area or might be reserved for other uses as might be determined by the relevant authority. In such a case, where the open space is not reserved for use of activities such as playgrounds or parks, but reserved as a green lung area or for the road reserve in a particular area, a company would be entitled to use and enjoy the open space or open public place. The provisions of s. 38 of the Ordinance are only intended to spell out the general authority over care and control of public place by the local authority and it is not merely confined to places where activities through physical usage such as walking through, playgrounds or parks as contended by the defendants. By looking at the provision of the section, even if the open space in this case fell within 'open public place' it was still subject to the terms and conditions of the open space at the time the general authority and care was vested with the local authority. (paras 34 & 35)

Case(s) referred to:

Boyce v. Paddington Borough Council [1903] 1 Ch 109 ***(refd)***

Chong Sui Jin & Ors v. Jeramas Sdn Bhd & Anor And Another Case [2012] 1 LNS 896 HC ***(refd)***

HL Bolton (Engineering) Co Ltd v. TJ Graham & Sons Ltd [1957] 1 QB 159 ***(refd)***

Lennard Carrying Company Limited v. Asiatic petroleum Company Limited [1915] AC 705 ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, s. 3
Land Ordinance (Sabah)(Cap 68), s. 28(1)
Local Government Ordinance 1961 (Sabah), ss. 2, 38(1)
Rules of Court 2012, O. 33 r. 2

For the plaintiff - Norbert Yapp & Eow Yi Pei; M/s Norbert Yapp & Assocs
For the 1st, 2nd, 5th & 6th defendants - Chung Jiun Dau; M/s Chung & Assocs

Reported by Najib Tamby

JUDGMENT

Ismail Brahim JC:

[1] This is an application filed by the first, second, fifth and the sixth defendants (defendants) for the following issues to be determined/tried as preliminary issues under O. 33 r. 2 of ROC. The application was premised on the grounds that the determination of these issues in favour of the defendants would conclude the plaintiff's action against the defendants and there would be no necessity to try the other issues in the plaintiff's action herein.

[2] The issues are as follows:

(a) That the issue whether the plaintiff as a company is able to use and enjoy open public places be determined before the trial of this matter;

(b) That the issue whether the plaintiff is able to or has the standing to sue for loss and damage for allegedly being deprived of the use and enjoyment of open public places be determined before the trial of this matter;

[3] From the issues that are proposed to be determined, the central question that needs to be addressed by the court is on the *locus standi*/ standing of the plaintiff to sue the defendants and the plaintiff being a company and not a natural person is able to use and enjoy open public places.

[4] Based on the issues above, it was contended that if both the answers to these issues are in the negative ie, the plaintiff as company cannot enjoy or use open public places and the authority over the said places lies with the local Government authority, then the plaintiff's case would have no basis and there would be no necessity for a trial of the action save for the defendants' counterclaim. It was also submitted that the disposal of these issues would save time and expenditure.

[5] With the brief introduction of the matter before this court, I turn now to the facts of the case. In this case, the plaintiff is a registered owner of a piece of land in Signal Hill Kota Kinabalu. Currently, the plaintiff's land is being developed into a 13-storey condominium. The defendants in this case are the registered owners of land adjacent to the plaintiff's land. The dispute between the parties arose in respect of a designated open space separating the

plaintiff's land and the properties belonging to the defendants. In the statement of claim, the plaintiff avers that the open space which is endorsed on the all the documents of titles of the parties are meant for the benefit, use and enjoyment of all the adjoining landowners and inhabitants of the area. In the alternative, it was averred that the plaintiff as a ratepayer, user and inhabitant of the said area has the common right to the designated open space within the meaning of s. 38 of the Local Government Ordinance 1961 (LGO).

[6] It was further averred in this case that the defendants have disturbed and interfered with the plaintiff's rights of use and the enjoyment of the open space by wrongfully erecting permanent structure on the said open space. It was averred that the defendants have put up structures like garages, 'pondok' and gate on the said open space.

[7] Based on the above actions of the defendants, in the present claim, the plaintiff seeks for an order that the defendants remove and demolish the encroachments and obstructions on the open space and also for damages.

[8] In the statement of defence, the relevant averments as regards to the issue in this application can be found at para. 6, where the defendants aver that whilst open spaces are for the benefit and enjoyment of inhabitants of the area and they are not necessarily for the benefit and enjoyment of the registered landowner. At para. 9, it was averred that some of the structures complained by the plaintiff were erected more than 30 years ago and all these while there were no complaints by the inhabitants of the area including the plaintiff. It was also averred in the circumstances, the plaintiff's claim is barred by acquiescence, laches and delay. It is to be noted at para. 11, the defendants averred to the issue that is central to this application now that is "The plaintiff is not capable of use and enjoyment of the open space. Therefore the plaintiff did not and could not suffer any loss and damage".\

The Submissions Of The Parties

[9] In the written submission, the defendants addressed the issues that the plaintiff as a company and not a natural person could not enjoy and use the open space as follows.

[10] It was submitted that the open space which the term or phrase used by the plaintiff in the statement of claim, which is not defined refers to open public place as stated in s. 38(1) of the LGO. The defendants then referred to s. 38(1) of the Local Government Ordinance 1961 (Sabah No. 11 of 1961) which provides as follows:

> 38. (1) The Authority shall have the general control and care of all public playing grounds, parks and all other open public places, other than roads and streets, and of all gardens, playing grounds, parks and other enclosed places within any urban area which have been or shall be at any time set apart and appropriated by proper authority for the use of the public or to

A which the inhabitants of the urban area shall at any time have or acquire a common right and the same shall be vested in such Authority in trust to keep the same open or control the use of the same for the benefit of the inhabitants subject to any terms and conditions imposed at the time of such vesting, by the Yang di-Pertua Negeri or by any donor of such land.

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[11] It was submitted that public playgrounds, parks and such areas which are for the use of the public or inhabitants referred to as open public places in s. 38(1) are for the use of the public or the inhabitants.

[12] It was further submitted that open public places such as playing C grounds, gardens and parks can only be used or enjoyed by natural persons through physical usage such as walking through or sitting in such open public places.

[13] It was also submitted that the plaintiff being a company whilst it is a legal entity is still an artificial person and has no physical body or is unable D to use or enjoy open public places.

[14] The defendants also referred to the word "inhabitants" in s. 38(1) and submitted that by the use of the said word, the section indicates that the person who can use open public places are living and natural persons.

E **[15]** To further support the arguments on this point, the defendants referred to the meaning of the word in *Webster's Encyclopedic Unabridged Dictionary* of the English Language, where it is stated the word 'inhibit' means 'to live or dwell in (a place) as persons or animals' and the word 'inhabitant' means 'a person or animal that inhibits a place'.

F **[16]** It was also submitted that from the tenure of s. 38(1) of the LGO, the phrase 'for the use of the public' would suggest physical usage which is not possible by an artificial body such as a company.

[17] As regards the issue of *locus standi*, it was submitted that s. 38 does not give the public or the inhabitants any proprietary or property rights over such G open public places. It was submitted that s. 38 provides that the authority that is empowered to control the use of open public places would be the local authority ie, the Mayor of Dewan Bandaraya Kota Kinabalu (DBKK).

[18] It was submitted that in the circumstances, the plaintiff has no authority or standing to take out the present action, and if there was any H obstruction or interference in the use of the open public places, the party to initiate or to take up further action in this matter would be the Mayor/ DBKK.

[19] As regards the contentions of the plaintiff that it had been instructed I by the authority to landscape and beautify the open public place, it was submitted that the instructions given is at best showed the plaintiff is required to do the acts as an agent of the DBKK and it did not give the plaintiff the right to sue the defendants.

[20] In response to the submission of the defendants, the plaintiff contends that there is a distinction between open space and open public places. It was submitted, the open space as stated in the title deed refers to an open place within a residential area and is different from a public open place such as playground, or park or other open space reserved for the public. In the present case, it was submitted that the term open public places is more apt to describe a place earmarked for recreational or leisure activities, which are readily and freely accessible to the wider community. In the present case, it was submitted that the open space is surrounded by the parties' lands which are residential properties. It was, therefore, contended that the open space was not meant for the benefit of the members of the general public. To further support the above proposition, the plaintiff relied on the provision of s. 28(1) of the Sabah Land Ordinance where it was pointed out that the Yang di-Pertua Negeri may reserve any State lands which in his opinion are required for any public purpose or for a residential reserve. It was submitted that the said section goes on to state that such reservation shall fully describe the land and purpose for which it is reserved and shall be conclusive evidence that the land is reserved for a public or residential purpose. It was, therefore contended that in the present case, since the open space is within a residential area, it was reserved as residential reserve and not intended to be an open public place.

[21] The next point of contention raised by the plaintiff is on the cause of action of the plaintiff in this case. It was submitted that the plaintiff's cause of action is premised on the tort of public and private nuisance.

[22] It was submitted that the arguments that an open public place or that the open space in the present case may only be utilised or enjoyed by natural person is erroneous by relying on s. 3 of the Interpretation Acts 1948 and 1967 (Act 388) which provides a "person" is defined to include a body of persons, corporate or unincorporated. It was submitted based on the said section, a natural person would include a body corporate by statutory interpretation.

[23] In support of the above proposition, the plaintiff refers to two English cases, *Lennard Carrying Company Limited v. Asiatic Petroleum Company Limited* [1915] AC 705 and *HL Bolton (Engineering) Co Ltd v. TJ Graham & Sons Ltd* [1957] 1 QB 159.

[24] As regards the submission that open public places can only be used for activities through physical usage such as walking through or sitting in such open public places, it was submitted that the argument was misconceived as the space may be used for other activities such as to act as a green lung or an area where no human activities may be carried out.

[25] It was also submitted that in the land title held by the parties, the term used is open space and not open public place as stated in s. 38(1) of the LGO and hence the reliance on s. 38(1) of the LGO to define the meaning of the open space is misconceived. It was further contended that the said section therefore cannot be used to limit the right of the plaintiff to enjoy the open space which is endorsed on the title.

[26] As to the defendants' contention that the plaintiff has no *locus standi* to sue for the loss and damage for being deprived of the use and enjoyment of the open space, it was submitted that there was no substance in the said contention. That argument is wrongly premised on the subject matter being open public place instead of open space. Section 38(1) of the Local Government Ordinance 1961 does not apply in the present case because the plaintiff is suing in its own right. The permanent obstructions created by the defendants by their illegal constructions is a form of nuisance and trespass which directly affected the plaintiff's property rights.

[27] It was further submitted that the plaintiff is entitled to remove the nuisance created or caused by the defendants. In support of the proposition, the plaintiff relied on the case of *Boyce v. Paddington Borough Council* [1903] 1 Ch 109, where the court held that a plaintiff has the *locus* to sue in respect of an alleged private right or in respect of an alleged interference with a public right without joining the Attorney-General as a plaintiff.

[28] The plaintiff further referred to s. 2 of the Sabah Local Government Ordinance 1961 which defines "nuisance" as follows to further support its contention that the plaintiff has the *locus standi* to maintain the action:

> any act, omission or thing occasioning or likely to occasion injury, annoyance, offence, harm, danger or damage to the sense of sight, smell or hearing or which is or likely to be injurious or dangerous to health or property or which affects the safety or the rights of the inhabitants at large.

[29] As for case law, the plaintiff in the written submission has referred to the case of *Chong Sui Jin & Ors v. Jeramas Sdn Bhd & Anor and Another Case* [2012] 1 LNS 896, where the judge in the said case had adopted the above definitions and held that the plaintiffs as the adjoining landowners and ratepayers were entitled to sue for a public nuisance. The case involves the encroachment of an open space as well. The plaintiffs as the adjoining landowners and ratepayers had complained about the open space being unlawfully developed into as commercial shop lot by a private developer in a joint venture with the local authority.

The Principles Applicable In O. 33 r. 2 ROC

[30] The legal principles in an application under O. 33 r. 2 of the ROC is well settled. For the purpose of this judgment, it would suffice if I refer to the case of *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337, where it was stated as follows:

> Order 33 r. 2 of the RHC states that the court may order any question or issue arising in any cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated. The Federal Court in *Palaniappa Chettiar v. Sithambaram Chettiar & Ors* [1982] 1 MLJ 186 agreed with the learned judge in holding that it would be convenient to try the preliminary issue, as if the contention of the respondents was upheld, that could conclude the whole proceedings and it would be unnecessary to try the other issues. In *Sl Rajah & Anor v. Dato' Mak Hon Kam & Ors (No. 1)* [1994] 1 CLJ 207, Lim Beng Choon J, after considering a large number of authorities on the ambit of O. 33 r. 2 and its equivalent, stated that before deciding to allow the preliminary questions to be raised, the court must bear in mind the following observations: (a) As a general rule the Court will exercise its power under O. 33 r. 2 if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial as a whole. (b) An order under the said rule should not be made in respect of matters which by reason of the obscurity either of the facts or the law ought to be decided at the trial of the suit. (c) Preliminary points of law have been described as too often of so-called issues of fact, the justification is even harder to discern. (d) A preliminary question should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question which is being ordered to be tried as a preliminary issue.

Findings

[31] With the above principles in mind, I will now deal with the issues in this application. After having considered the submission, I am of the view the issue that is central and ought to be considered first is issue [b], ie, the issue whether the plaintiff has the *locus standi* or the standing to sue the defendants. The thrust of the defendants' argument on the issue is premised on their contention that the open space is an open public place as stated in s. 38(1) of the LGO. It was submitted based on s. 38(1) that the authority that is vested with the jurisdiction over the open public place is the Mayor/Dewan Bandaraya Kota Kinabalu. Based on the above proposition, it was submitted that plaintiff did not have the necessary *locus standi* to bring the present action against the defendants.

[32] In the written submission, the plaintiff has relied on the decision in *Chong Sui Jin & Ors v. Jeramas Sdn Bhd & Anor and Another Case* [2012] 1 LNS 896, to counter the defendants' above argument.

The decision in the said case, which was submitted as had been upheld by the Court of Appeal also concerned an open space. The said case is a case that was decided after a full trial. One of the issues in the said case relates to an open space which was reserved for the purpose of a road reserve. The issue that came before the court was the contention of the parties whether the plaintiff as an inhabitant of the area has acquired common right over the public open place as stated in s. 38 of the LGO. The learned High Court Judge in the said case stated as follows:

> 73. My understanding from the plain wording in section 38 is that the local authority shall have general control and care of the places specified therein. These places shall be vested in the local authority in trust to keep them open, care and control the use of them for the benefit of the inhabitants subject to any terms and conditions imposed at the time of vesting by the TYT or by the donor of land. The specified places include open public places, parks, playing grounds within any urban area to which the inhabitants of the urban area shall at any time have or acquire a common right.
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> 74. In the light of my earlier finding that the area comprising of Blocks C, D and E are open space and pursuant to section 38(1) of the Local Authority Ordinance, it is my considered view that the Plaintiffs as inhabitants in Bandar Sabindo have acquired common right over them.

[33] Based on the decision in the above authority, I take the view that s. 38(1) does not preclude the inhabitants to take legal action in their own right, or in this case, the plaintiff, as it has common rights over the open space as endorsed in its land title. The issue whether it has a case that is founded on the tort of public/private nuisance or trespass would be a matter to be decided in a trial and determined based on extrinsic evidence.

This can be seen further in the judgment at p. 896 when the learned judge made a finding in favour of the plaintiff in respect of an action under the tort of nuisance.

> 110. In respect of Block C and D, PW9 who is the first Plaintiff, gave evidence that she bought her shop in Bandar Sabindo based on the first DP which shows that Block C and Block D of the Land are reserved as open space. Now she is deprived of the use and enjoyment of the Land due to the nuisance created by the 1st Defendant. Instead of enjoying the open space, the frontage of her shop is now facing the back of this uncompleted structure that the 1st Defendant had put up on Block D.
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> 111. *I am satisfied that the 1st Plaintiff has shown that she has suffered special damage over and beyond the general inconvenience and injuries suffered by the public. For this reason, the nuisance created by the 1st Defendant on the Land comprising Block D has to be removed.*

In respect of Block E, there is no evidence from any of the Plaintiffs to show the 1st Defendant had created a public nuisance thereby interfering with their enjoyment of the open space in the Land comprising Block E. As such, the Plaintiffs have failed to prove public nuisance on the Land comprising Block E.

(emphasis added)

Issue (a)

[34] As regards the arguments that the plaintiff as a company is not able to enjoy and use open public place, I am of the view that there are merits on the arguments of the plaintiff that an open space may not necessarily refers to places that can only be used for activities through physical usage such as walking through or sitting in such places. The open space endorsed on a land title may also be used as a green lung area or may be reserved for other uses as may be determined by the relevant authority. In the case of *Chong Sui Jin & Ors v. Jeramas Sdn Bhd & Anor (supra)* the open space was intended for a road reserve in the area.

[35] In such a case where the open space is not reserved for use of activities such as playgrounds or parks, but reserved as a green lung area or for the road reserve in a particular area, a company in my view would be entitled to use and enjoy the open space or open public place.

It is to be noted that the provisions of s. 38 are only intended to spell out the general authority over care and control of public place by the local authority and it is not merely confined to places where activities through physical usage such as walking through, playgrounds or parks as contended by the defendants. By looking at the provision of the section "subject to any terms and conditions imposed at the time of such vesting, by the Yang di-Pertua Negeri or by any donor of such land" in my opinion, shows even if the open space in this case falls within 'open public place' it is still subject to the terms and conditions of the open space at the time the general authority and care is vested with the local authority.

[36] Based on all the above reasons, I find that there are no merits in the application and, I accordingly ordered that the notice of application be dismissed with costs of RM1,500 to be given to the plaintiff subject to the payment of allocatur.